United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

75-7326

To be argued by
JAMES A. WADE, ESQ.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7326

STANLEY V. TUCKER

Appellant,

—v.—

THOMAS E. MESKILL, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLEES

SENATOR STANLEY H. PAGE

and

REPRESENTATIVE HOWARD A. NEWMAN

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TABLE OF CONTENTS

CITATIONS

Cases:

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BRIEF OF APPELLEES

Statement of the Case

Appellant, Stanley Tucker, has brought a pro se complaint in the United States District Court for the District of Connecticut, which purports to seek declaratory and injunctive relief and damages under 42 United States Code, Sections 1983 and 1985. Underlying Appellant's complaint is a claim that Section 49-44 of the Connecticut General Statutes (Revision of 1958) is unconstitutional. This statute is Connecticut's post-judgment lien statute which authorizes the filing of a lien on the land records for any unsatisfied judgment obtained in any court of

Connecticut or of the United States within Connecticut. The complaint further alleges that the Defendants, Anderson, Neal, Crikelair and Threlkeld, caused to be recorded certain liens on properties owned by the Appellant in Connecticut resulting from judgments issued by the California state courts.

In addition to the above referenced defendants, appellant Tucker has sued Thomas E. Meskill, individually and in his capacity as the Governor of the State of Connecticut;[1] John P. Cotter, Chief Court Administrator for the State of Connecticut; State Senator Stanley Page; and State Representative Howard Newman. This brief concerns itself solely with the claims against Senator Page and Representative Newman.

At the time the complaint was filed defendants Page and Newman were a State Senator and a State Representative representing the 12th Senatorial District and the 137th Assembly District respectively. Both were members of the 1973/1974 Connecticut General Assembly and were co-chairmen of the Connecticut General Law Committee thereof (see affidavits of Senator Page and Representative Newman, Appellant's Appendix, pp. F1 and F2). Since the filing of the complaint Representative Newman has ceased to be a member of the Connecticut General Assembly, not having been reelected for the 1975/1976 session.[2] Senator Page was reelected to the Connecticut General Assembly and continues to be a member thereof. However, Senator Page is no longer Chairman of the General Law

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[1] No effort has been made by the plaintiff to substitute Governor Ella Grasso in her representative capacity as a party defendant notwithstanding the fact that Governor Meskill has been succeeded in office.

[2] See Statement of Vote, General Election November 5, 1974, State of Connecticut, Public Document No. 26, p. 72.

Committee or any other committee since his political affiliation now places him in the minority.[3]

The only allegations against defendants Page and Newman are that they, in their capacity as State Officers, "wantonly and willfully [sic] and maliciously and negligently permitted the existence [sic] and continuance of State Statute G.S. 49-44" which statute allegedly violates the appellant's due process and equal protection rights. (See Complaint, Paragraph 10; Appellant's Appendix, Page A4). The complaint goes on to allege that these defendants delayed in enacting legislation in response to certain decisions by the United States Supreme Court but did so finally by enacting Public Act 73-431[4]. (See Complaint, Paragraph 14, Appellant's Appendix, Page A7). No other claims are alleged against defendants Page and Newman in the First Cause of Action. The Second Cause of Action is totally silent against these defendants since the only paragraphs wherein they are mentioned in the first count (i.e., Paragraphs 10 and 14) are not incorporated by reference into the second count.

The prayer for relief does not seek any equitable relief from these defendants since the only equitable prayer is to require the appropriate defendants (unnamed) promptly and properly to prepare releases of the judgment liens complained of and to cease from recording any such liens in the future. There is no claim that these defendants either recorded such liens or had the power to release them. No claim is made that they should introduce or adopt any remedial legislation (assuming, of course, they had the power to do so).

To this complaint the defendants, Thomas Meskill and John Cotter, filed defenses claiming that the complaint

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[3] See Roll, Committees and Rules of the General Assembly, State of Connecticut, 1975-76.

[4] Public Act 73-431 deals with prejudgment attachments. Its application to the present case is unclear.

failed to state a claim upon which relief could be granted and, further, that the allegations of the complaint are insufficient in law and fact to vest jurisdiction in the United States District Court. They go on to deny or plead lack of knowledge of the allegations contained in the complaint. (See Answer and Special Defenses of Defendants Meskill and Cotter, Appellant's Appendix, Page B1). The plaintiff made application for the convening of a three judge court.

The defendants Page and Newman filed a motion to dismiss the complaint against them pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, claiming that the court lacked in personam jurisdiction over them because of the immunity granted them by Article Third, Section 15 of the Connecticut Constitution and because the complaint itself failed to state a claim against them upon which relief could be granted. (See Motion to Dismiss by Defendants Page and Newman, Appellant's Appendix, Pages D2-D4).

The United Stat District Court, Clarie, *J.*, sustained the motion to dism..s, finding that defendants Page and Newman were protected by legislative immunity and that the complaint failed to state a claim on which relief could be granted on April 17, 1975. Judgment entered dismissing plaintiff's complaint on April 21, 1975. The plaintiff, Stanley Tucker, has appealed to this court from that judgment.

Issues

1. Did the District Court err in dismissing the complaint against the defendants, Page and Newman on the ground that they are protected by the legislative immunity provisions of Article Third, Section 15 of the Connecticut Constitution (1965)?

2. Did the District Court err in dismissing the complaint against the defendants Page and Newman on the ground that the complaint on its face failed to state a claim against these defendants upon which relief could be granted?

ARGUMENT

I.

Article Third, Section 15 of the Connecticut Constitution (1965) protects the defendants Page and Newman from being questioned "in any other place" about their legislative duties.

The Connecticut Constitution (1965) contains a "speech or debate clause"[5] which tracks identically with that contained in the United States Constitution.[6] The purpose of

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[5] Connecticut Constitution, Article Third, Section 15 provides: The senators and representatives shall in all cases of civil process, be privileged from arrest during any session of the general assembly and for four days before the commencement and after the termination of any session thereof. And for any speech or debate in either house, they shall not be questioned in any other place.

[6] Constitution of the United States, Article 1, Section 6 provides in part: . . . and for any Speech or Debate in either House they [the senators and representatives] shall not be questioned in any other place.

the Speech or Debate Clause of the United States Constitution is to "prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary." *Gravel* v. *United States*, 408 U.S. 606, 617 (1972): *Powell* v. *McCormack*, 395 U.S. 486, 502 (1969); *United States* v. *Johnson*, 383 U.S. 169, 181 (1966). Whenever it has been called upon to interpret this historic language the Supreme Court has done so gingerly fully recognizing the delicate balance between the branches of government, leading Chief Justice Burger to note in *United States* v. *Brewster*, 408 U.S. 501, 508 (1971):

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, threfore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

What the Speech or Debate clause does is create a privilege which cloaks the words and deeds of a legislator, immunizing him from civil and criminal prosecution. As was said in *United States* v. *Johnson, supra* 383 U.S. at 179:

> The legislative privilege protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary is one manifestation of the "practical security" for ensuring the independence of the legislature.

It is this legislative independence that the defendants Page and Newman are asserting herein. They should not be required to respond in a court of law and to defend any action which essentially involves a dispute between private citizens simply because a statute with which one party takes issue happens to have been enacted by some previous General Assembly. To hold otherwise would be to expose legislators to suit every time the constitutionality of a statute is called into question.

The concept that a court is without power to hear and determine claims against a state legislator otherwise protected by the Speech or Debate Clause, was established in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951). In that case plaintiff sought to enjoin the members of the California Legislature's Senate Fact Finding Committee on Un-American Activities from convening a so-called investigative hearing on the ground that the real purpose of the hearing was to smear him. The Supreme Court upheld the decision of the United States District Court dismissing the complaint regardless of the unworthy purposes or motives that the legislators might have had. In doing so the court said:

> Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty or disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. 341 U.S. at 377-378.

In its opinion in *Tenney,* the Supreme Court quoted with approval the language of Chief Justice Parsons in *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808) in which he said:

> "[The Massachusetts legislativ privilege] ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office: and I would define the article, as securing to every member exemption from prosecution for everything said or done by him, as a representative, in the exercise of the functions of that office without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives chamber."

Thus it has been held that the "legislative privilege will be read broadly to effectuate its purposes," *United States* v. *Johnson, supra* at p. 180; *Gravel* v. *United States,* 408 U.S. 606, 624 (1972); *Doe* v. *McMillan,* U.S. , 36 L.Ed. 2d. 912, 920 (1973), and includes within its protection anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1880); *United States* v. *Johnson, supra* at p. 179; *Gravel* v. *United States, supra,* at p. 624; *Powell* v. *McCormack,* 395 U.S. 486, 502 (1969); *United States* v. *Brewster, supra,* at pp. 509, 512-513.

The reach of the clause extends to both civil and criminal prosecutions. *Johnson, supra,* involved the conviction of a former United States Congressman who was

convicted of conspiring to make a speech for compensation on the floor of the House of Representatives along with other charges. The Supreme Court affirmed the Court of Appeals decision setting aside that portion of the conviction holding that prosecution under a general criminal statute was barred by the speech or debate clause. *Id.* at pp. 184-185.

In *Tenney* v. *Brandhove, supra,* the Supreme Court acknowledging that a similar privilege was operative for state legislators based upon a similar provision in a state constitution, noted that at the time forty states (Connecticut among them) had constitutional provisions containing the protection of the privilege. In upholding the privilege the court said in 341 U.S. at p. 377:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona* v. *California,* 283 U.S. 423, 455.

More recently the Supreme Court has held that the privilege extends not only to legislators but to their aides and staff who are engaged in assisting the members of the Congress in fulfilling their day to day functions as legislators. *Gravel* v. *United States, supra,* 408 U.S. at 616. Thus it can be seen that the Supreme Court has broadly

interpreted the Speech or Debate clause to bring within its protection those acts or words of a legislator generally done by a legislator in relation to the business before the house of which he is a member.

The authorities relied upon by the appellant challenging the claim of legislative immunity by these defendants are simply inappropriate as applied to the facts of this case. Perhaps this is the result of the appellant's tendency to lump executive privilege and legislative immunity as identical concepts. This misconception is manifested by appellant's claim that "the district court most generously grants all of the state officer defendants legislative immunity notwithstanding two of them (Governor Meskill and Justice Cotter) are not legislators." (Appellant's Brief, p. 13). In fact, Judge Clarie, clearly distinguished the status of the state officer defendants, and did not apply legislative immunity to all of them:

> The two state legislators are clearly protected by the legislative immunity provisions of Article Third Section 15, covering the Speech or Debate Clause in the Connecticut Constitution (1965). See, e.g., *Tenney* v. *Brandhove,* 341 U.S. 367 (1951). The status of absolute judicial immunity similarly cloaks the defendant Cotter, as Judicial Officer and Chief Court Administrator; for the official acts which are required of him to be performed in his judicial capacity. *Pierson* v. *Ray,* 386 U.S. 547 (1967). The claim alleged against former Governor Meskill is that as the Chief Executive of the state, he should have initiated a change in the stautory procedures concerning judgment liens. The Court finds that he had no obligation so to do and that he violated no statutory or common law duty in not taking affirmative action in this regard. See, *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974). (Appellant's Appendix, p. H4).

Having fundamentally misconstrued the language of the District Court, the appellant then cites *United States* v. *Nixon,* U.S. , 41 L.Ed. 2d 1039 (1974) for the proposition that the "due process rights of American Citizens were greater than the immunity claims of the President in light of the absence of a showing the national security was at stake." (Appellant's Brief, p. 13). *Nixon,* of course, can be distinguished solely on the ground that it involved the non-constitutional doctrine of executive privilege instead of the constitutional immunity, specifically granted by Connecticut Constitution, Article Third, Section 15 asserted by these defendants. Moreover, the Supreme Court in *Nixon* held that indeed an Executive Privilege did exist but that on the facts of that case, it must yield to the specific needs of the Special Prosecutor absent a claim that the nation's security was in peril. Surely, the appellant herein does not claim that the judgment liens filed against him imperil the nation's security.

Appellant also relies upon an unreported state court decision, *Kagan* v. *King,* Hartford Superior Court, Docket No. 189957 (December 8, 1971) (Appellant's Appendix, pp. K1-K5) for the claim that legislative immunity is not available to these defendants. That decision is a ruling upon a demurrer by the legislator defendant involved in which it was stipulated that the legislator had made certain statements about the plaintiff to the news media when he was not participating in a legislative session on the floor of the house or employed in a legislative committee session. The court merely held that a legislator's immunity is not absolute and does not extend to "everything said or done by him as a representative, in the exercise of the functions of that office." (See, Appellant's Appendix, p. K5). This decision by no means eliminates legislative immunity and certainly does not impose liability on an individual legislator because of his failure to repeal a statute claimed, but not judicially determined, to be unconstitutional.

In the present case there is no claim of individual wrongdoing by either of the deefndants Page or Newman. The only allegations involving them claim that they permitted certain legislation to continue to exist [7] and that they delayed in taking affirmative action regarding prejudgment remedies. Surely these allegations fail to lift the principle of immunity from suit guaranteed these legislators by Article Third, Section 15, of the Connecticut Constitution.

II.

The complaint fails to state a claim against the defendants Page and Newman upon which relief can be granted.

If this court finds that the defendants Page and Newman are not immune from suit on the basis of the Speech or Debate Clause in Connecticut's Constitution, an examination of the complaint and the relief sought therein reveals that no claim has been alleged against them upon which relief can be granted. They are not necessary parties to any suit to determine the constitutionality of Section 49-44, and therefore the District Court was correct in dismissing the complaint against them. While a substantial portion of appellant's brief is devoted to a discussion of the merits of his constitutional claim, it is the position of these defendants that the lower court's ruling on their motion to dismiss for failure to state a claim upon which relief can be granted should be tested by a review of the complaint itself. Accordingly this brief addresses itself to the allegations against them in the complaint itself and does not

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[7] It is interesting to note that Connecticut General Statutes, § 49-44, of which the plaintiff complains, has existed in its present form since 1949, with a history extending back to 1902. Neither of these defendants even participated in its enactment. The plaintiff has made no allegation that he ever sought their aid in attempting the repeal of this law.

focus on the constitutionality of Section 49-44. That issue can be resolved by a trial between the private litigants, an action to which these defendants need not be parties.

A. Political Question Doctrine.

The only claim against these defendants is that they failed in their capacities as state legislators to take action to repeal Section 49-44. Obviously the plaintiff seeks a political not a judicial remedy in this regard. His forum should appropriately be the Connecticut General Assembly, not this court insofar as these defendants are concerned.

It is well established that the federal courts will not adjudicate political questions. *Powell* v. *McCormack,* 395 U.S. 486 (1969); *Coleman* v. *Miller,* 387 U.S. 433 (1939); *Oetjen* v. *Central Leather Co.,* 246 U.S. 297 (1918).[8] In *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), the Supreme Court listed six categories of cases which historically involve questions deemed political and therefore non-justiciable:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's

[8] The primary underpinning of the political question doctrine has been the separation of powers within the federal government. *Baker* v. *Carr,* 369 U.S. 186, 217 (1962). However, in view of the clear separation of powers doctrine established by Article Second of the Connecticut Constitution (1965) and the many decisions of the Connecticut Supreme Court enforcing same, the analogy seems apparent. See e.g. *Szarwak* v. *Warden,* 36 Conn. Law Journal, No. 4, (July 23, 1974); *Adams* v. *Rubinow,* 157 Conn. 150, 251 A.2d 49 (1968); *Walkinshaw* v. *O'Brien,* 130 Conn. 122, 32 Atl. 547 (1943); *Styles* v. *Tyler,* 64 Conn. 432, 38 Atl. 165 (1894).

> undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In the present case, based upon the allegations against these defendants it is clear that all the plaintiff seeks from them is the repeal of Section 49-44. While the District Court has the power to declare that statute unconstitutional, it is powerless to compel a repeal thereof. Even assuming these two defendants could by themselves marshall the votes necessary to achieve such a result, since the rest of the members of the Connecticut General Assembly are not parties to this action, any order by the District Court as to these defendants would not be enforceable as to the Assembly as a whole. If Mr. Tucker seeks repeal of Section 49-44, let him seek out the political solution.

B. No Affirmative Action Sought Against These Defendants.

Having claimed that these defendants "permitted" Section 49-44 to continue to exist as a statute, the plaintiff then ignores them as to any claim for relief. He neither asks for the repeal of the law nor that they take any action insofar as the judgment liens filed against him are concerned. Once again it is obvious that he cannot seek such relief because it is impossible for the District Court to order the same. Since these defendants are not necessary for an adjudication of the constitutionality of the statute complained of, the court properly dismissed the case against them.

C. No Claim of a Violation of either a Representative or Individual Duty.

Nowhere in the complaint does the plaintiff claim that these defendants have failed to fulfill any duty towards him in either a representative or individual capacity. While it is alleged that each of them were sworn to uphold the federal constitution and to administer the laws of Connecticut, nowhere is it alleged that they violated those mandates other than to "permit" a statute to remain law which, on its face, is presumed [9] constitutional unless decreed otherwise by a court. It appears that the allegations against these defendants serve no function other than to mention them as part of the political process. There is no claim that either of them failed to fulfill any of their responsibilities by not affirmatively seeking the repeal of Section 49-44.[10]

The only claim against these defendants individually is in the title to the action. No facts are alleged against them in their individual capacities. Accordingly, the court was correct in dismissing the complaint against Messrs. Page and Newman as individuals on that basis alone.

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[9] A state statute is presumed to be constitutional. *Montano* v. *Lee*, 298 F. Supp. 865, 869 (D.C. Conn. 1967); *aff'd*, 384 F.2d 172 (2d Cir. 1967).

[10] It is interesting to note that any bill dealing with judgment liens would properly come under the jurisdiction of the Joint Committee on Judiciary, not the Joint Committee on General Law. See Joint Rules of the Senate and House of Representatives, State of Connecticut, 1973-1974 Session, Rules 3(g) and (p), p. 72. It appears that these defendants are not even the proper parties to begin the process to effectuate the repeal of Section 49-44.

D. Second Count Alleges no Facts Against these Defendants.

Regardless of the failings of the First Count to state a claim upon which relief can be granted, the Second Count is utterly deficient since the only two paragraphs in which these defendants are mentioned in the First Count are not incorporated by reference into the Second. Absent any factual allegations against Messrs. Page and Newman in the Second Count, it was properly dismissed.

CONCLUSION

It is respectfully submitted that Senator Page and Representative Newman are protected by Article Third, Section 15 of the Connecticut Constitution (1965) from having to answer in any other place for their doings as legislators. The only claim against them deals directly with their offices as legislators. They are not necessary parties to an adjudication of the constitutionality of Section 49-44 of the Connecticut General Statutes. Therefore, the District Court was correct in dismissing the complaint against them on this ground.

In the alternative, the complaint was properly dismissed because it raises fundamentally a political non-justiciable issue, i.e. the repeal of a state statute. Additionally, no facts are alleged or relief sought which sets forth a cause of action against these defendants.

Therefore the defendants Page and Newman respectfully claim that the judgment of the District Court for the

District of Connecticut dismissing the complaint against them should be affirmed.

Respectfully submitted,

APPELLEES,
State Senator Stanley H. Page and
State Representative Howard A. Newman,
Individually and in their representative capacities.

By /s/ JAMES A. WADE

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CERTIFICATION

This is to certify that copies of the foregoing bill have been mailed, postage prepaid to:

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-7324

STANLEY V. TUCKER
APPELLANT

V.

THOMAS E. MESKILL et al
APPELLEES

AFFIDAVIT OF SERVICE BY MAIL

ALBERT SENSALE, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 BROOKLYN AVE BROOKLYN, N.Y.

That on the 1st day of OCTOBER, 1975, deponent served the within BRIEF OF APPELLEES

upon STANLEY V. TUCKER, BOX 35, HARTFORD, CONNECTICUT 06101
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Attorney(s) for the APPELLANTS in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 1st day of OCTOBER 1975

SEAN J. FAY
Notary Public, State of New York
No. 24-4612261
Qualified in Kings County
Commission Expires March 30, 197_

Sean J. Fay